Supreme Court, U. S.
FILED
MAR 8 1977
MICHAEL RODAK, JR., CLERK

No. 76-1006

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

SIDNEY M. GLAZER,
JOSEPH S. DAVIES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1006

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37a-38a) is not reported. The opinion of the district court (Pet. App. 1a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1976. A petition for rehearing was denied on December 21, 1976 (Pet. App. 39a). The petition for a writ of certiorari was filed on January 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is entitled to a new trial because a state agent overheard and relayed to the federal

prosecutor a conversation between petitioner and an attorney discussing a plan to obstruct justice at petitioner's federal trial, when the prosecutor made no use of the information.

STATEMENT

An indictment returned in the United States District Court for the Southern District of New York on May 27, 1971, charged petitioner and others with various violations of the federal securities laws, mail and wire fraud, and conspiracy. On January 26, 1973, following a jury trial, petitioner was convicted on 11 counts of the indictment. He was sentenced to a total of three years' imprisonment and fined $55,000. On January 4, 1974, the court of appeals affirmed. *United States* v. *Dioguardi*, 492 F. 2d 70. This Court denied certiorari. 419 U.S. 829.

On December 11, 1974, petitioner moved for a new trial on the ground of newly discovered evidence, claiming that during trial the prosecutor had knowledge of conversations between petitioner and his attorney. Petitioner asserted that the New York State district attorney's office turned over to the federal prosecutor information derived from an illegally intercepted conversation between petitioner and Julius November, a friend and a lawyer, and that this information caused the prosecutor not to call Aubrey Moss as a government witness at petitioner's trial.[1] Following a hearing, the district court denied the motion in a thorough opinion, on which we basically rely (Pet. App. 1a-36a).

---

[1]Petitioner notes (Pet. 9-10) that several discussions concerning petitioner's anticipated federal trial were overheard. There is no suggestion in the record that any of these discussions (other than the one between petitioner and November) even arguably involved attorney-client confidences, or that the substance of any other conversation was disclosed to federal officials.

The evidence at the hearing on petitioner's motion showed that New York state law enforcement authorities commenced electronic surveillance of petitioner's office and telephones in late October 1972, while petitioner was awaiting trial on the federal charges. The surveillance—which was conducted pursuant to orders issued by state judicial officers—continued until February 21, 1973, after petitioner's federal trial, and it was part of an investigation principally directed at obtaining evidence that petitioner and others were committing the state crime of usury (App. 209-210, 678-679).[2] The federal government took no part in this investigation. During the course of the state's court-ordered electronic interceptions, a detective overheard a conversation on November 21, 1972, among petitioner, William Kilroy, and Julius November, a lawyer.[3] The detective was unaware (Pet. App. 13a), and the conversation did not disclose, that November was a lawyer (App. 54-55, 172, 681-682).

The conversation began with a discussion of loans but soon turned to other matters. The detective concluded that he was overhearing preparations for a crime—the blackmail of Aubrey Moss, a potential witness at a trial (App. 687). It could be inferred from the conversation that November possessed a typewritten statement that Moss, a married man whom petitioner and November believed would be a government witness in the federal trial, was having an affair with a secretary in petitioner's

---

[2]"App." refers to petitioner's appendix in the court of appeals.

[3]November had represented petitioner in civil litigation. He is not familiar with federal practice in criminal cases (Pet. App. 10a), and he did not represent petitioner in any of his criminal trials (Pet. App. 5a-6a).

office. The two men then discussed how the statement could be used to discourage Moss from testifying in the upcoming trial (see Pet. App. 6a-10a and n. 6).

Believing that he might have overheard an attempt to commit the state crime of coercion of a witness (Pet. App. 13a-15a), the detective discussed the conversation with fellow officers. Ultimately the matter was brought to the attention of the state district attorney's office (App. 687-688). State prosecutors agreed that they were obliged to alert the federal prosecutors to a potential obstruction of justice (Pet. App. 16a). Because of legitimate concern for the security of the state investigation, however, they agreed not to tell the federal prosecutors the source of the State's information (Pet. App. 16a-18a; App. 691-692).

At a meeting on December 22, 1972, a representative of the district attorney's office informed the federal prosecutor that petitioner possessed information about Moss that might be used in an effort to obstruct justice (Pet. App. 18a). The state prosecutor did not reveal the source of this information, nor did he recommend what use, if any, should be made of the information (*ibid.*). The federal prosecutor responded that there was no possibility that information about Moss could be used to obstruct justice in the federal case, because the government already had decided not to use Moss as a witness (*ibid.*; App. 390, 394-395, 694-695). There were no further contacts between the state and federal prosecutors until after petitioner's trial (Pet. App. 20a).

The district court concluded that the information communicated had no effect whatsoever on the federal trial (Pet. App. 29a-33a). It found that prior to his meeting with the state authorities, the federal prosecutor had interviewed Moss and, based on his belief that Moss would

be an untruthful witness, had decided not to call him to the stand (*id.* at 29a-30a). It also found that Moss's testimony would not have aided petitioner's defense, a conclusion that is supported not only by petitioner's desire not to have him testify but also by the absence of any defense efforts to secure his testimony (*id.* at 23a-24a, 30a-31a). The court wrote that the state surveillance was conducted without the knowledge or participation of the federal government and pursuant to court orders that were believed by the state officers to be lawful (*id.* at 24a, 26a-29a);[4] that the state detective who overheard the conversation had no reason to believe that November was an attorney (*id.* at 13a, 27a); and that the members of the district attorney's office who later listened to the recording concluded reasonably and in good faith that the intercepted conversation concerned a plan to coerce Moss not to testify against petitioner in his pending federal trial (*id.* at 13a-16a, 27a-28a).

The court concluded that the decision of the state authorities to report their suspicions to the federal prosecutor was "motivated solely by a high-minded sense of ethical obligation to insure proper and unobstructed administration of federal criminal justice" (Pet. App. 28a) and that "[t]he scope and extent of the communication [to the federal prosecutor] were severely limited to that sufficient to satisfy the necessit[y]" (Pet. App. 25a) to alert the federal authorities to a possible obstruction of justice.

---

[4]On February 4, 1975, a state court held that prior wire interception orders directed against persons other than petitioner had been issued without an adequate showing of probable cause (see Pet. App. 24a). Since the conversations intercepted pursuant to those defective orders were used to establish probable cause for the electronic surveillance of petitioner's offices, the government stipulated for purposes of the new trial motion that the interception of petitioner's conversation on November 21, 1972, was tainted. Although petitioner does not appear to have standing to challenge the legality of the original interceptions, which did not violate his rights, we do not dispute that stipulation here.

The district court held that a new trial is not automatically required by any overhearing of attorney-client conversations if, as here, the actions of both federal and state authorities, rather than being corrupt, are "pursued in complete good faith" (Pet. App. 29a). The court also concluded that, because petitioner had suffered no prejudice as a result of the State's overhearing the November conversation, a new trial was not warranted (*id.* at 29a-33a). The court of appeals affirmed, relying on the opinion of the district court (*id.* at 37a-38a).

ARGUMENT

Petitioner's contention that there must be a new trial whenever any conversation between a defendant and an attorney is overheard by a law enforcement agent is foreclosed by *Weatherford* v. *Bursey*, No. 75-1510, decided February 22, 1977. *Weatherford* held that the Sixth Amendment's right to counsel could be infringed only by a purposeful intrusion into attorney-client confidences or use of confidential information by the prosecutor at trial. Neither occurred here.

Whether or not the overheard information—that petitioner and attorney November contemplated using knowledge of Moss's alleged adultery either to discourage Moss from testifying or to impeach his credibility—would have been useful to the government,[5] the fact remains that, at the time this information was transmitted, the federal prosecutor already had decided not to call Moss as a witness. The federal prosecutor did not capitalize on any information learned from intrusions into legitimate trial

[5]It is unlikely the information would have been of any use even if the government had wanted to call Moss as a witness, because, as the district court noted (Pet. App. 10a-12a), adultery is not a basis for impeachment of a witness's credibility.

planning conferences. Here, as in *Weatherford*, the important Sixth Amendment concerns have not been activated, and there is no need to inquire further. Nothing undermined the proper functioning of the adversary system in petitioner's criminal case.[6]

Weatherford also exposes the error of petitioner's argument (Pet. 27-30) that the district court was required to assume that the state prosecutor transmitted more than the information regarding Moss, and that the federal prosecutor capitalized upon this information. Petitioner was afforded an evidentiary hearing to establish what was communicated by the state to the federal prosecutor, and the district court found that only the information relating to Moss's alleged adultery was revealed.[7] District courts are

[6]The court of appeals' refusal to adopt a *per se* rule requiring a new trial whenever attorney-client conversations have been overheard does not conflict with this Court's decision in *Black* v. *United States*, 385 U.S. 26, and *O'Brien* v. *United States*, 386 U.S. 345, as *Weatherford* v. *Bursey*, *supra*, slip op. 6, makes clear:

> If anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial. This is a far cry from the *per se* rule announced by the Court of Appeals below, for under that rule trial prejudice to the defendant is deemed irrelevant. Here, the courts below have already conducted the "judicial determination," lacking in *Black* and *O'Brien*, of the effect of the overheard conversation on the defendant's conviction, and there is nothing in their findings nor in the record to indicate any "use of evidence that might otherwise be inadmissible."

[7]Even if the information had been used to advantage by the federal prosecutor, it would be hard to imagine how this could have affected the fairness of petitioner's trial in any particular. November, although an attorney, was not retained by petitioner to represent him in the federal trial. No conversations between petitioner and his retained counsel were

capable of determining the extent of any communication (*Weatherford, supra,* slip op. 10-11), and their evidentiary findings are controlling unless clearly erroneous.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

SIDNEY M. GLAZER,
JOSEPH S. DAVIES, JR.,
Attorneys.

MARCH 1977.

---

heard; no legitimate trial strategy was compromised; no critical information was disclosed. The detective who overheard the conversation between petitioner and November did not know that November was an attorney; any prophylactic rule based on the Sixth Amendment could not deter overhearings of this variety.

Moreover, even in the context of the traditional attorney-client relationship, discussions of committing crime are not privileged. *Clark* v. *United States*, 289 U.S. 1, 15 (*dictum*); 8 Wigmore, *Evidence* §§ 2298, 2299 (McNaughton rev. 1961). So far as state authorities knew, petitioner and November never had discussed any legitimate defense strategy; their conversation, instead, seemed to concentrate on the planning of a crime, for which there is no constitutionally-protected claim of confidentiality. Finally, any use the federal prosecutor could have made of the conversation between petitioner and November would have protected the legal system against subversion by apparent blackmail; in other words, use of the information, far from undermining the adversarial criminal justice system, would have prevented the system from being undermined.

[8]Although, as we said in *Weatherford* (Br. 48 n. 33), it may be appropriate to resolve against the government doubts regarding the extent of the information communicated by an agent, this is not a reason to hold new trials in every case—especially where, as here, the extent of the transmission of information has been reliably determined.